No. 95-____ Supreme Court, U.S.
FILED

95-719 NOV 3 - 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit err by applying a state and not federal standard of appellate review to determine whether a jury award in a diversity action was excessive, in direct conflict with this Court's decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)?

2. Did the Second Circuit err by applying a state and not federal standard of appellate review to determine whether a jury award in a diversity action was excessive, in direct conflict with the holdings of other circuits?

3. Does the Seventh Amendment permit a federal appellate court to overturn a jury award as excessive, particularly where the trial judge considered and rejected a post trial claim of excessiveness under Fed. R. Civ. P. 59?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit dated and entered on September 12, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is scheduled to be published at ___ F.3d ___ (1995), and is unofficially reported at 1995 WL 540410 (2d. Cir. (N.Y.)), and at 1995 U.S. App. LEXIS 25860. The decision is reprinted in full in the Appendix hereto at 1a-10a. The district court judgment and post-trial order appealed from were issued without opinion and are unpublished. They are reprinted in the Appendix hereto at 13a-14a.

JURISDICTION

The final decision of the Second Circuit overturning the jury verdict and conditionally ordering the remittitur was entered on September 12, 1995. 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

STATEMENT OF THE CASE

A. Introduction.

A leading commentator has observed:

> There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial.

11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2818 at 194 (2d ed. 1995).

As an increasing number of federal appellate courts overturn jury verdicts as excessive, *see* Eric Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 238, 313, the Second Circuit's decision in this case provides a stark example of the threat posed to the Seventh Amendment when a federal court of appeals departs from clear Supreme Court precedent and substitutes its judgment for that of the jury.

In a startling decision, the Second Circuit abandoned what it acknowledged was "the traditional [federal] standard" for reviewing jury verdicts for excessiveness and applied a far more invasive state standard "which accords less deference to the jury's award than does the traditional standard," *solely* because the appeal arose in a diversity action. 8a. Thus, the Second Circuit declared: "This being a diversity case, we are *bound* to follow the standard set forth in the New York statute."[1]

Even though it found there were no trial errors, and rejected the argument that the jury acted out of any passion or prejudice, the Second Circuit nonetheless overturned the jury's award of damages. In so doing, the court conducted a *de novo* review of the facts and issued a conditional remittitur of the jury's award, based on the New York standard that mandates the Appellate Division review questions of fact to determine whether the verdict represented "reasonable compensation." 8a (citing N.Y. Civ. Prac. L & R. § 5501(c) (McKinney 1995)).

The Second Circuit's application of the state standard of appellate review to review the jury award for excessiveness violates this Court's clear holdings in prior cases. For this reason alone, certiorari should issue to resolve the Second Circuit's conflict with this Court's precedent.

In addition, the decision below is a further, dramatic example of the confusion and conflict that has developed among the federal circuits regarding the appropriate standard of appellate review to be applied in diversity actions when reviewing jury awards for excessiveness.

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[1] The Second Circuit declared it was "bound" by its own precedent decided a month earlier in *Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781 (2d. Cir. 1995), despite the fact that Consorti applied the state standard *ipsi dixit*, and without providing any rationale for rejecting the federal standard.

Hence, this case provides an important opportunity for this Court to resolve these conflicts, establish clear federal standards once and for all, and preserve the Seventh Amendment's guarantee of the right to a jury trial.

B. Factual Background And Trial Proceedings.

Noted CBS News correspondent William Gasperini commenced this diversity action in the United States District Court for the Southern District of New York against the Center For Humanities, Inc. (the "Center"), because the Center lost 310 of Gasperini's original and irreplaceable slide transparencies.

Shortly after trial began, the district judge granted Gasperini's *ore tenus* motion for a directed verdict on the issue of liability. Hence, the only issue that went to the jury was an assessment of damages. After a three-day trial on damages, with factual and expert testimony from eight witnesses, and significant documentary evidence,[2] the jury returned a verdict of $450,000 for Gasperini. *See* 11a.

The testimony supporting Gasperini's case was largely uncontroverted. The evidence established that his photographs were of the highest quality in the industry. The jury was shown that the lost transparencies represented Gasperini's life work on Central America created over a seven-year period, under conditions impossible to recreate (including the repeated risk of serious injury or death in war zones and travel to remote jungle and mountain regions).

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[2] Jurors were shown, *inter alia*, a video produced by the Center containing reproductions of over 100 of Gasperini's lost transparencies, and were provided with a meticulous description -- in writing, and augmented by Gasperini's testimony -- of the content of each of the 310 lost photographs and the circumstances under which each was taken.

Finally, expert testimony established that Gasperini's photographs would have had a recurrent value over the remaining 94 years of his copyright, that the market value for a one-time use of a single, original transparency could be as high as $30,000, and that the average value of Gasperini's photographs was $1,500 each.

After verdict, the Center moved for a new trial pursuant to Fed. R. Civ. P. 59(a), arguing that the trial judge erred in admitting certain evidence, and independently, that the jury's award was excessive. After extensive briefing, the Hon. Charles L. Brieant, who presided over the case from its inception, denied the motion. 11a-12a.

C. The Second Circuit's Decision.

The Second Circuit found no error at trial, expressly rejecting the Center's argument that evidence was admitted erroneously. 4a-5a. Nor did the Second Circuit find that the jury's verdict was influenced by passion or prejudice, or that there was any other defect in the trial proceedings.

Nonetheless, the Second Circuit overturned the jury's verdict as excessive, and ordered a new trial unless Gasperini would remit all but $100,000 in damages. 2a, 10a.

The Second Circuit's decision was remarkable because it held that, in a diversity action, not only did state substantive law apply, but further, that state law governed the appellate standard for reviewing the jury's verdict. 8a. Under the New York standard, the Appellate Division -- which is empowered to make *de novo* findings of fact -- "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995), *cited in* 8a. The Second Circuit conceded that "[t]his standard accords less deference to the jury's award than does the traditional [federal] standard, under which the jury's

award is overturned only if it is so excessive as to shock the conscience of the court." 8a.[3]

Thus, apparently viewing itself as unbound by the Seventh Amendment or the federal standard, the Second Circuit proceeded to a *de novo* review of the "reasonable[ness]" of the jury's award under New York State law. Without citing any support in the record, the Court of Appeals "found" that the majority of the lost transparencies were worth no more than $100 each, and thus dramatically reduced the original jury award. 9a.[4]

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[3] On two occasions prior to its decision here, the Second Circuit expressly avoided determining whether the state standard, enacted in 1986, should be applied in federal court, explaining that its decision would be the same under either standard of review, i.e., that the jury award "shocked the conscience" of that court, and therefore, did not constitute "reasonable compensation." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1189-90 (2d Cir. 1992); *Gardner v. Federated Department Stores, Inc.*, 907 F.2d 1348, 1353 n.1 (2d Cir. 1990). In contrast, the Second Circuit clearly implied in this case that application of the federal standard would have resulted in a different outcome because the court specifically noted that the state standard "accords less deference to the jury's award than does the traditional [federal] standard," and then proceeded to apply the state standard, rather than the federal standard. (8a)

[4] The Second Circuit did not explain, nor did the record support, its determination of which photos were worth $100 and which photos were worth more. In fact, the $100 figure, which was the Second Circuit's valuation for 250 of the 310 transparencies, appears nowhere in the record.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD FOR APPELLATE REVIEW OF A FEDERAL JURY VERDICT CONFLICTS DIRECTLY WITH THE DECISIONS OF THIS COURT.

The Second Circuit's decision below conflicts directly with this Court's pronouncement in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). In *Browning-Ferris*, this Court considered the interplay of state and federal law in appellate review of jury verdicts for excessiveness:

> It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our *only* inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. . . . *Federal law . . . will control on those issues involving the proper review of the jury award by a federal district court and court of appeals. . . .*

492 U.S. at 278-79. (citations and footnotes omitted) (emphasis supplied).[5] *See also Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977) ("[t]he proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts *is . . . a matter of federal law*") (emphasis supplied).

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[5] Because the Court upheld the jury verdict in *Browning-Ferris*, it declined to reach the question of whether the Seventh Amendment allowed appellate review of jury verdicts at all. *Id.* at 279 n.25. *See infra* at 11-14.

In direct conflict with *Browning-Ferris*, however, the Second Circuit held that, in a diversity action, state and not federal law governs appellate review of a federal jury award for excessiveness. 8a.

The importance of the Second Circuit's conflict with this Court in *Browning-Ferris* cannot be overstated. Federal courts, including those exercising diversity jurisdiction, are bound by the constraints of the Seventh Amendment. *Browning-Ferris*, 492 U.S. at 280 n.26 ("federal courts operate under the strictures of the Seventh Amendment"); *see also A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 359-60 (1962). Conversely, the state courts are not bound by the Seventh Amendment. *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Thus, the states are free to adopt highly intrusive standards for appellate review of jury verdicts, unrestricted by Seventh Amendment concerns. As a result, importing state standards into diversity cases completely eviscerates Seventh Amendment protections.

Yet, that is precisely what occurred in this case. The state standard adopted by the Second Circuit mandates that "[t]he appellate division shall review questions of law and questions of fact . . . [and] "*shall* determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995) (emphasis supplied), *quoted in* 8a.[6] According to the Second Circuit, this standard requires appellate courts to "exercise closer control over jury awards," *Consorti*, 64 F.3d at 790, and therefore, is far more intrusive than the federal standard.

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[6] CPLR § 5501 sets forth the standard of review for all the New York appellate courts. Whereas CPLR § 5501(c) mandates the Appellate Division to make *de novo* findings of fact, in contrast, CPLR § 5501(b) provides: "The court of appeals shall review questions of law only, except that it shall review questions of fact where the appellate division . . . has expressly or impliedly found new facts . . . ."

See David Siegel, Practice Commentary, N.Y. Civ. Prac. L. & R. § 5501, at 24 (McKinney 1995). It is therefore clear that application of the New York standard by a federal appellate court violates the Seventh Amendment.

As Chief Justice Rehnquist noted:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, . . . and thus keep the administration of law in accord with the wishes of the community. . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting).

This Court should grant certiorari to resolve the significant conflict between the decision below and this Court's decisions preserving the Seventh Amendment right to a jury trial. *See* Sup. Ct. R. 10.1(c); *Pernell v. Southall Realty*, 416 U.S. 363, 365 (1974) (granting certiorari "[b]ecause of the novel nature of the Seventh Amendment question"); *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949) (granting certiorari "because of the importance of preserving for litigants . . . their right to a jury trial").

II. THE SECOND CIRCUIT'S APPLICATION OF A STATE STANDARD OF APPELLATE REVIEW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Second Circuit's holding is in direct, active conflict with recent holdings of other circuits. The Court of Appeals for the First, Fourth and Seventh Circuits have expressly held that, in diversity actions, the federal and not state standard applies to the appellate review of jury awards claimed to be excessive. *Laubach v. Khajawai*, No. 94-2421, 1995 WL 508879, at **2 (4th Cir. Aug. 29, 1995) (refusing to apply state standard for reviewing excessiveness, "the granting or denial of a new trial in a diversity action is a matter of procedure governed by federal law and not by state substantive law."); *Mayer v. Gary Partners and Co.*, 29 F.3d 330, 334-35 (7th Cir. 1994) (federal not state law applies to review of all issues concerning sufficiency of the evidence including verdicts that are allegedly excessive); *Lakin v. Daniel Marr & Son*, 732 F.2d 233, 235 (1st Cir. 1984) ("we measure the excessiveness of a jury award not . . . according to the state's standard of review, but according to that ordinarily applied in the federal courts").[7]

The Second Circuit's decision in this case also directly conflicts with the practice -- if not explicit holdings -- of the Third and Tenth Circuits. *E.g., Peco Energy Co. v. Boden*, 64 F.3d 852, 859 (3d Cir. 1995) (applying federal "shocks the conscience" standard for reviewing claims of excessiveness in diversity actions); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1169-71 (10th Cir. 1981) (same).

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[7] The Sixth Circuit may also be in conflict with the decision below. *See Blasky v. Wheatley Trucking, Inc.*, 482 F.2d 497, 498 (6th Cir. 1973) (state law is not controlling on whether to grant or deny new trial on the ground of excessiveness, as this issue is within discretion of the district court).

While the Second Circuit is alone in its complete departure from the once axiomatic proposition that federal law governs appellate review of jury verdicts in diversity cases, the Fifth, Eighth and Eleventh Circuits pay lip service to the standard mandated by this Court, while continuing to apply the state standard. In practice, these circuits, like the Second Circuit, wrongly apply state law when determining the scope and standard of review of jury verdicts based on a claim of excessiveness. *Petrowski v. Southworth Products*, 15 F.3d 748, 753-54 (8th Cir. 1994) (applying state standard of appellate review); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1446 (11th Cir. 1991) (while "federal law applies to our review of the decision to order a new trial as the result of an excessive verdict, . . .[w]e look to [the less deferential, state statutory standard of appellate review] to determine whether the verdict is excessive"); *In re Air Crash Disaster Near New Orleans, La.*, 764 F.2d 1084, 1090 (5th Cir. 1985) (while federal law determines procedural question of new trial, "we may not affirm an award which could not be affirmed by the highest court of the state whose law we are applying").

Recent decisions by the Seventh and Eighth Circuits illustrate sharply the doctrinal split among the circuits.

The Eighth Circuit recently re-affirmed that court's long standing adherence to the application of state law standards of appellate review when considering the excessiveness of jury verdicts in diversity cases. *Petrowski*, 15 F.3d at 753-54. *See also Vanskike v. Union Pacific Railroad*, 725 F.2d 1146, 1150-51 (8th Cir. 1984) ("this court is aware of its duty to refer to the law of the forum state when determining the inadequacy or excessiveness of a jury verdict") (citing *Hysell v. Iowa Public Service Co.* 559 F.2d 468, 472 (8th Cir. 1977)).

In contrast, the Seventh Circuit has consistently applied federal standards of review to appeals alleging excessive jury verdicts. *Roggow v. Mineral Processing*, 894 F.2d 246, 249 (7th Cir. 1990); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 970-71 (7th Cir. 1973). And, while the Seventh Circuit has never deviated from this position, it had been inconsistent, until

recently, on the broader issue of whether state or federal standards should apply to other aspects of the interaction between judge and jury. To correct this, the Seventh Circuit in *Mayer* relied on this Court's pronouncements in *Browning-Ferris* and *Donovan* and ended many years of confusion by adopting a uniform rule of applying federal standards of review to jury verdicts in diversity cases. Under its new uniform rule, federal and not state standards of review apply whenever either the trial judge or the appellate court considers a motion for a new trial on *any* basis. 29 F.3d at 334-35. Thus, the Seventh Circuit strongly stated its position that federal law must be applied by a federal court exercising diversity jurisdiction when reviewing jury verdicts claimed to be excessive.

Because the irreconcilable split among the circuits threatens the role of the jury as guaranteed by the Seventh Amendment, *see* Point I, *supra*; Point III, *infra*, this Court should grant certiorari to resolve this conflict and set a clear standard. *See* Sup. Ct. R. 10.1(a) & (c).

III. THE SECOND CIRCUIT'S DECISION RAISES THE IMPORTANT, UNDECIDED QUESTION OF WHETHER THE SEVENTH AMENDMENT PERMITS AN APPELLATE COURT TO REVIEW A JURY AWARD FOR EXCESSIVENESS.

Three times in the past, most recently in 1989, this Court granted certiorari to determine whether the Seventh Amendment permits appellate review of a district court's denial of a Rule 59 motion to set aside a jury award as excessive. In each case, this Court upheld the jury's verdict, and thus found it unnecessary to reach the question. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n.25 (1989); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968); *Neese v. Southern R. Co.*, 350 U.S. 77 (1955). This Court should now settle this important federal question raised by the Second Circuit's decision below. *See* Sup. Ct. R. 10.1(c).

In preserving the right to trial by jury, the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. In a case such as this, where there is no finding of trial error of any kind, appellate review of a jury's verdict for excessiveness could be warranted under the Seventh Amendment only if appellate courts exercised such authority at common law.

However, "[e]veryone concedes that the weight of the evidence could not be raised by writ of error and thus was not subject to appellate review at the time the Seventh Amendment was adopted." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2819 at 203 (2d ed. 1995) ("Wright, Miller & Kane"). Thus, as this leading commentator has concluded, "[t]o allow appellate review of the denial of the new-trial motion . . . would be a complete reversal of common-law practice and is very difficult to reconcile with the Seventh Amendment." *Id.* at 204.

Indeed, this Court, in a case decided much closer to when the Seventh Amendment was enacted, held it

> is a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error.

United States v. Laub, 37 U.S. (12 Pet.) 1, 5 (1838).

Indeed, as recently as 1940, this Court stated categorically: "[c]ertainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940). *See also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933) (circuit court of appeals

without power to review federal trial court's grant or denial of new trial based on a claim of excessiveness); *Southern Ry. -- Carolina Div. v. Bennett*, 233 U.S. 80, 87 (1914); *Metropolitan R. Co. v. Moore*, 121 U.S. 558, 574 (1887).

Nonetheless, despite the absence of any change in the law, in the last fifty years, every federal circuit has arrogated to itself the power to review and reverse a trial court's denial of a motion for a new trial solely on the ground that the verdict is excessive. *See* Wright, Miller & Kane § 2820 at 209 & n.10. The federal circuits are exercising this newly asserted power in an increasingly aggressive fashion. *See* Eric Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 238, 248, 313 ("Schnapper") (study finds appellate courts overturned 50% of all appeals in which the jury verdict was claimed to be excessive).

Because the federal circuits have asserted their authority to review jury verdicts for excessiveness in the absence of any pronouncement from this Court, they are operating without ascertainable standards. This Court has never given explicit approval to any standard of review. Wright, Miller & Kane § 2820 at 212. And while all federal circuits have purportedly adopted standards requiring a strong showing before the verdict will be reversed, *see id.* at 212-14 & nn. 24-25 (citing cases), there is no uniformity among the circuits, and no clear articulation of what these inherently elastic standards mean. *See Grunenthal*, 393 U.S. at 159 n.4.

For example, many courts articulate the standard of review as an "abuse of discretion" where the losing party made a Rule 59 motion. *Id.* at 212-13 & n. 24 (citing cases). But a 1984-1985 study of appellate decisions found that,

> out of sixty-eight appeals involving a challenge to the size of a verdict, the original "abuse of discretion" standard was applied in only seven cases. Among the thirty-four cases overturning a verdict as excessive, there is not

> a single instance in which a panel purporting to apply an abuse of discretion standard actually found that such an abuse had occurred.

Schnapper, 1989 Wis. L. Rev. at 320 (footnotes omitted). In other words, many federal courts of appeals have assumed the power to review jury verdicts *de novo*.

A number of circuits use a different standard, holding that a jury verdict will be overturned when it represents a "monstrous or shocking injustice," *Norton v. Caremark, Inc.*, 20 F.3d 330, 340 (8th Cir. 1994) or is "grossly excessive, clearly not supported by the evidence, or based only on speculation or guesswork," *Boem v. American Broadcasting Co., Inc.*, 929 F.2d 482, 488 (9th Cir. 1991) or constitutes a "grave abuse of discretion." *Baker v. Dillon*, 389 F.2d 57 (4th Cir. 1968) *See also* Wright, Miller & Kane § 2820 at 213-14 & n.25 (citing cases). As Schnapper observes:

> It would be a rather considerable exaggeration to characterize these formulations as legal standards. None of the appellate decisions provide any guidance for distinguishing a "shockingly" high verdict from one that is merely "stunningly," "surprisingly," or "very" high. One Fifth Circuit decision acknowledged that an appellate decision applying this formulation could not "be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation."

Schnapper, 1989 Wis. L. Rev. at 322-23 (quoting *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151, 1156 (5th Cir. 1985)).

The Second Circuit's decision in this case highlights these common problems facing the federal appellate courts. For example, notwithstanding this Court's pronouncement in *Browning-Ferris*, the Second Circuit did not even mention, much less follow, an abuse of discretion standard regarding the Center's claim that the trial judge abused his discretion in denying the Rule 59(a) motion.

Likewise, while the Second Circuit stated that its "traditional standard" is to reverse jury verdicts for excessiveness only where they "shock the conscience of the court," (8a), it implicitly limited that standard to federal question cases and adopted the state standard solely for diversity cases. 8a. Thus, the court applied the far more invasive state standard which *requires* the appellate division of the New York state courts to reverse a jury verdict whenever it "deviates materially" from "reasonable compensation." *Id.* By adopting the state standard, the Second Circuit placed itself in the role of a thirteenth juror -- with veto power.

CONCLUSION

The decision below calls out for this Court's intervention. This Court should grant certiorari to determine whether and to what extent federal appellate courts may review jury verdicts for excessiveness, consistent with the mandate of the Seventh Amendment.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A -- DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AND ENTERED SEPTEMBER 12, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1133 -- August Term, 1994

(Argued: March 8, 1995 Decided: September 12, 1995)

Docket No. 94-7823

WILLIAM GASPERINI,

Plaintiff - Appellee,

v.

THE CENTER FOR HUMANITIES, INC., doing business as Guidance Associates,

Defendant - Appellant.

B e f o r e: MAHONEY, WALKER, and CALABRESI,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*), after a jury trial, awarding damages against defendant-appellant Center for Humanities, Inc., in the amount of

$450,000 for the loss of 300 slide transparencies belonging to plaintiff-appellee William Gasperini.

Reversed and remanded for a new trial on the issue of damages unless Gasperini agrees to remit all damages in excess of $100,000.

Francis A. Montbach, New York, NY (Bingham Englar Jones & Houston, New York, NY, on the brief), *for Appellant Center for Humanities, Inc.*

Samuel A. Abady, New York, NY (Jonathan S. Abady, David N. Mair, Rubin, Kalnick, Bailin, Ortoli & Abady, P.C., New York, NY, on the brief), *for Appellee William Gasperini.*

CALABRESI, *Circuit Judge*:

Although we usually think of photography as creating a permanent record, its permanence is tenuous at best. This is particularly so in the case of slide transparencies, the medium in which most professional photographers work. Duplication of the original transparency is difficult and necessarily involves a significant loss of quality. As a result, commercially viable prints can in most cases only be made from the original transparency. And once an original slide transparency is lost, the ability to make commercially usable prints is also lost, leaving behind only those prints that had already been made. This reality lends a certain urgency to transactions involving the use of original transparencies.

In this case, plaintiff-appellee William Gasperini, a journalist, provided some three hundred slides to the defendant-appellant Center for the Humanities ("the Center"), slides which the Center

subsequently lost. The Center conceded liability for the lost transparencies, and a jury trial on the issue of damages was held before the United States District Court for the Southern District of New York (Brieant, *J.*). The jury returned an award of damages for Gasperini in the amount of $450,000. Because we conclude that this award is excessive under New York law (the applicable law in this diversity case), a new trial will be required unless Gasperini agrees to a remittitur and accepts an award of $100,000.

I. BACKGROUND

William Gasperini is a well-regarded journalist for CBS News and the Christian Science Monitor. Since he began his journalism career in 1984 in Central America, Gasperini has earned his living primarily in the radio and print media, although, on occasion, he has also sold photographs. Gasperini's earnings from photography, by his estimation, total just over $10,000 for the period from 1984 through 1993.

In 1990, Gasperini entered into a contract with the Center, under which Gasperini agreed to supply the Center with original color transparencies that he took in Central America between 1984 and 1990. Gasperini delivered 300 transparencies to the Center; he claimed that his mother produced an additional ten transparencies at a later date. The Center used the transparencies in the preparation of an educational videotape titled *Conflict in Central America*. Gasperini was to be paid a royalty of fifteen percent of the cash receipts from the sale of the videotape. It was understood that the Center would return the original transparencies to Gasperini when work on the videotape was completed. But when the time came, and despite an extensive search, the Center could not locate the transparencies.

Gasperini brought this diversity action in the District Court for the Southern District of New York. The Center admitted liability, and the issue of damages was tried to a jury in June 1994. At the trial, Gasperini presented evidence, largely through expert witness Jane Kinne, that an "industry standard" within the

photographic publishing community valued lost transparencies at $1,500 each. Following a three-day trial, the jury returned a verdict awarding Gasperini damages of $450,000, which, according to the jury foreman, represented $1,500 each for 300 transparencies. The Center moved for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. The district court denied the motion without comment, and this appeal followed.

II. DISCUSSION

Because the jury returned a damage award equal to the so-called industry standard of $1,500 per lost transparency, the Center focuses its argument on the propriety of allowing the jury to hear evidence about that standard. According to the Center, in the absence of an explicit agreement to pay the so-called industry standard as liquidated damages in the event transparencies are lost, no industry standard exists under New York law. Because there was no liquidated damages agreement in this case, the Center contends that it was error to deny the Center's motion *in limine* and to allow the jury to hear evidence about an industry standard.

The Center is correct that the Appellate Division of the New York Supreme Court has on two occasions refused to recognize an industry standard as, by itself, determinative of value. *See Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 571-72, 592 N.Y.S.2d 27, 28 (lst Dep't), *leave to appeal denied*, 82 N.Y.2d 651, 601 N.Y.S.2d 581 (1993); *Alen MacWeeney, Inc. v. Esquire Assocs.*, 176 A.D.2d 217, 218, 574 N.Y.S.2d 340, 341 (lst Dep't 1991), *leave to appeal dismissed*, 79 N.Y.2d 1015, 584 N.Y.S.2d 437 (1992). But the Appellate Division has not unequivocally rejected the relevance of evidence of an industry standard when such evidence is combined with other proofs. Rather, the court has concluded: "This record, as well as case law, makes it clear that no such standard exists, without,*inter alia*, a consideration of the uniqueness of the subject matter of the slides and the earning level of the photographer." *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341; *see also Nierenberg*, 189 A.D.2d at 572, 592

N.Y.S.2d at 28 (quoting *MacWeeney*). From the references to the "record" in these decisions, it is apparent that the New York courts view the existence of an industry standard as, at least in part, a question of fact, subject to proof at trial. Accordingly, the district court did not err in allowing the jury to hear evidence about an industry standard.

That said, the jury's award cannot stand. As we have noted, New York law, in setting damages for lost transparencies, requires a consideration of (1) the uniqueness of the transparencies and (2) the earning level of the photographer. *Blackman v. Michael Friedman Pub. Group, Inc.*, 201 A.D.2d 328, 328, 607 N.Y.S.2d 43, 44 (lst Dep't 1994); *Nierenberg*, 189 A.D.2d at 572, 592 N.Y.S.2d at 28; *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341. And Gasperini failed to make a showing on either point sufficient to sustain the jury's verdict.

Without question, some of the transparencies were unique: as Gasperini described them, they depicted combat situations in which Gasperini was the only photographer present. But Gasperini also testified that on numerous occasions other able, professional photographers were present, sometimes in large numbers, when he took photographs that were among the three hundred lost. Although we accept the proposition that each photographer brings his or her own skills, judgment, and perspective to a particular scene, leading to some variation between photographs of a single event, no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original.

Gasperini's earning record as a photographer further undercuts the jury verdict. The only evidence presented on this point was that the commercial use of Gasperini's photographs yielded income of slightly more than $10,000 over the ten year period from 1984 through 1993; in no year did he earn more than $3,720.40. For all his skills as a photographer, Gasperini did not earn his living with his camera, and there was no evidence presented that he would do so in the future. Gasperini did testify

that he had intended to produce a book about his experiences in Central America, a project that he claims is now doomed to failure by the loss of the three hundred transparencies. But there was no evidence presented that Gasperini had found, or would have been able to find, a publisher for such a work, much less that the volume would have earned him significant income.

Given the New York requirement that we consider the uniqueness of the lost transparencies and the earning level of the photographer, rather than relying solely on the so-called industry standard, the testimony of Jane Kinne, Gasperini's expert on the valuation of photographs, is of little utility. Ms. Kinne did testify that, in her opinion, the lost transparencies should be valued at $1,500 each. Her explanation for this valuation, however, said a lot about the alleged industry standard and virtually nothing about either uniqueness or earning level. Ms. Kinne explained the value she gave to the transparencies as follows: a transparency taken by a professional photographer and selected in a professional edit is, under the industry standard, worth $1,500; Gasperini is a professional photographer whose work has been professionally edited; therefore, the value of each of the lost transparencies is $1,500. Thus, under Ms. Kinne's approach, a common photograph of the President exiting a helicopter (culled from a number of such shots), taken by an inexperienced but published photojournalist, would have the same value as a classic image taken by a photographer with the reputation of Walker Evans or Alfred Eisenstaedt. New York law does not countenance such a methodology.

The object of tort damages is to do what can be done to make an injured party whole; it is not meant to be a winning lottery ticket. In light of Gasperini's failure to make an effective showing that all 300 lost transparencies were unique, and the strong evidence of Gasperini's limited earning power as a photographer, the jury's award of $450,000 cannot be regarded as anything but a financial windfall for Gasperini.

A review of New York cases involving lost transparencies further supports the conclusion that the jury's award in this case

was excessive. *See Consorti v. Armstrong World Indus.*, No. 94-7501, slip op. at 6713 (when New York substantive law governs a diversity case, we look to New York decisions for guidance on the issue of excessiveness of damages). We acknowledge the limited utility of comparing damage awards in different cases, particularly since we find ourselves without access to the full records in the prior cases. *See id.* at 6716. Nevertheless, there is a clear pattern in appellate decisions addressing awards of damages for lost transparencies, and that pattern is instructive.

The Appellate Division has considered such damage awards on four occasions in the last six years. Only once did the court permit an award of $1,500 per lost transparency. *Girard Studio Group, Ltd. v. Young & Rubicam, Inc.*, 147 A.D.2d 357, 357, 536 N.Y.S.2d 790, 790 (1st Dep't 1989). In *Girard*, the court made no reference to the purported industry standard, but instead valued transparencies that "represented classics from a long career." *MacWeeney*, 176 A.D.2d at 218, 574 N.Y.S.2d at 341. In each of the other three cases, the Appellate Division reduced the award of damages to well under $1,500 per transparency. In *Nierenberg v. Wursteria, Inc.*, the court noted that, while there was evidence of the lost transparencies' uniqueness, that evidence was offset by the fact that the plaintiff earned little from still photography. It therefore rejected the application of the purported industry standard and reduced the damage award to $500 per transparency. 189 A.D.2d at 571-72, 592 N.Y.S.2d at 28. In *Blackman v. Michael Friedman Publishing Group*, where the record contained evidence of the photographer's earning power but no evidence of uniqueness, the court reduced a damage award from $1,000 per transparency to $400 per transparency. 201 A.D.2d at 328, 607 N.Y.S.2d at 44. And in *Alen MacWeeney, Inc. v. Esquire Associates*, despite evidence that the plaintiff was a successful photographer who earned $265,000 in the year of the loss, the court reduced a damage award from the claimed industry standard of $1,500 per transparency to less than $159 per transparency -- a total of $30,000 for 189 transparencies -- because of the generic nature of the transparencies' subject matter. 176 A.D.2d at 218, 574 N.Y.S.2d at 341.

Gasperini cites a number of unpublished New York trial court awards applying the claimed industry standard of $1,500 per lost transparency. But these cases are inapposite for three reasons. First, our role in a diversity case in which the state's highest court has not spoken on an issue is to attempt to discern how that court would decide the issue. *See O'Neill v. City of Auburn*, 23 F.3d 685, 689-90 (2d Cir. 1994); *Plummer v. Lederle Lab.*, 819 F.2d 349, 355 (2d Cir.), *cert. denied*, 484 U.S. 898 (1987). And we believe that published decisions of the Appellate Division are generally far better predictors of how the New York Court of Appeals would decide a question of state law than even a fair number of unpublished proceedings in the trial courts. Second, several of the unpublished decisions that Gasperini cites predate the Appellate Division's decisions in *MacWeeney* and *Nierenberg*; to the extent that the opinions are in conflict, the Appellate Division of course controls. And finally, as the district court noted, the bulk of the unpublished decisions are in cases that involved provisions under which the defendants expressly agreed to pay $1,500 in liquidated damages for any lost transparency. No such provision exists in this case.

New York law provides that, in a case where a jury returns an itemized verdict, as the jury did in this case, the Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). This standard accords less deference to the jury's award than does the traditional standard, under which the jury's award is to be upset only if it is so excessive as to shock the conscience of the court. *Consorti*, slip op. at 6712-13, 6717; *see also Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 278 (2d Cir. 1989) (stating the traditional standard). This being a diversity case, we are bound to follow the standard set forth in the New York statute. *Consorti*, slip op. at 6713.

Applying this standard, we conclude that the jury's award of $450,000 to Gasperini materially deviates from what is reasonable compensation. As we have said, where there is some evidence of uniqueness but no evidence of significant earnings, the New York

courts have determined that damages above approximately $500 per lost transparency are excessive. *Nierenberg*, 189 A.D.2d at 571-72, 592 N.Y.S.2d at 28. And where evidence of substantial earnings is offset by the absence of evidence of uniqueness, the courts have reduced damages awards to between $159 and $400 per lost transparency. *Blackman*, 201 A.D.2d at 328, 607 N.Y.S.2d at 44; *MacWeeney*, 176 A.D.2d at 217-18, 574 N.Y.S.2d at 341. In this case, Gasperini presented plausible evidence that some of his photographs were highly unique. Giving Gasperini every benefit of the doubt, there may have been as many as fifty such slides. The remaining photographs, however, were not unique; rather, they depicted either generic scenes or events at which other professional photojournalists were present. And, although Gasperini is a respected journalist whose contacts in the news industry may boost his prospects as a photographer, he has no established record of significant earnings from the commercial use of his photographs.

Drawing all reasonable inferences in favor of Gasperini, we conclude that the jury could have awarded damages of up to $1,500 per transparency for the transparencies as to which there was plausible evidence of significant uniqueness. As to the remaining transparencies, however, in light of Gasperini's limited earnings and the lack of uniqueness, any damage award of more than $100 per transparency would be excessive. Accordingly, we conclude that any award totalling more than $100,000 would exceed reasonable compensation.

Remittitur always presents difficult problems for appellate courts. We review the evidence on a cold paper record, and we compare that record to prior decisions as to which we have only an incomplete knowledge of the facts. This case is particularly difficult, since neither we nor the jury was able to see the lost transparencies themselves. In the end, it is not our job to impose a specific award of damages -- that task is for the jury. We do, however, have the obligation to patrol the outer bounds of what damages a jury may reasonably award, and to offer a choice between remittitur and a new trial when those bounds have been exceeded. *See Vasbinder v. Scott*, 976 F.2d 118, 122 (2d Cir.

1992); *Phelan v. Local 305 of the United Ass'n of Journeymen, & Apprentices of the Plumbing & Pipefitting Indus. of the United States & Can.*, 973 F.2d 1050, 1064 (2d Cir. 1992). Accordingly, we will set aside the jury's verdict of $450,000, and will order a new trial unless Gasperini acquiesces to an award of $100,000.

APPENDIX B -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AND ENTERED ON JULY 29, 1995

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

William Gasperini,

Plaintiff,

-against-

The Center For Humanities, Inc., d/b/a Guidance Associates,

Defendant.

----------X

93 Civ. 7204 (CLB)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Francis A. Montbach, sworn to on the 11th day of July, 1994, the exhibits annexed thereto and the accompanying Memorandum of Law, defendant, The Center for Humanities, Inc. d/b/a Guidance Associates, will move this Court, at the Courthouse, 101 East Post Road, White Plains, New York, Courtroom No. 31 for an Order pursuant to Rule 59 of the Federal Rules of Civil Procedure granting defendant a new trial, on the issue of damages, in the captioned matter, said motion to be heard on the 29th day of July, 1994, at 9:00 a.m. in the forenoon of that day.

In accordance with FRCP Rule 59(c), opposing affidavits, if any, must be served upon movant within ten (10) days of service hereof.

Dated: New York, New York.
July 11, 1994.

BINGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
The Center for Humanities d/b/a Guidance Associates

By /s/ Francis A. Montbach
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JONATHAN S. ABADY, ESQ.
Attorney for Plaintiff
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Motion Denied

SO ORDERED

U.S. DISTRICT COURT
S.D. OF N.Y.
FILED JUL 29, 1994

July 29, 1994

/s/ Charles Brieant
U.S.D.J.

ENTERED: August 4, 1994

APPENDIX C -- JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AND ENTERED ON JUNE 30, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

William Gasperini,	:	93 CIVIL 7204 (CLB)
Plaintiff,	:	JUDGMENT
-against-	:	U.S. DISTRICT COURT
The Center For Humanities, Inc., d/b/a Guidance Associates,	:	S.D. OF N.Y. FILED JUN 30, 1994
Defendant.	:	

The issues in the above entitled action having been brought on for trial before the Honorable Charles L. Brieant, United States District Judge with a jury on June 6, 1994, and at the conclusion of the trial, the jury having returned a verdict in favor of the plaintiff in the amount of $450,000.00 and the court thereafter directed the clerk to enter judgment in favor of the plaintiff with pre-judgment interest at the rate of 9% per annum from August 30, 1991, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff William Gasperini have judgment in the sum of $564,750.00, as against the defendant.

DATED: White Plains, N.Y.
June 30, 1994

APPROVED:

/s/ Charles Brieant
U.S.D.J.

/s/ James M. Parkison
Clerk

ENTERED: July 1, 1994

APPENDIX D -- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AND ENTERED ON JUNE 27, 1995

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

William Gasperini,

Plaintiff,

-against-

The Center For Humanities, Inc., d/b/a Guidance Associates,

Defendant.
----------X

93 Civ. 7204 (CLB)

MOTION IN LIMINE

S I R S :

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates, by its attorneys, BINGHAM ENGLAR JONES & HOUSTON, hereby moves this court, at the Courthouse, While Plains, New York on June 27, 1994 *in limine*, for an Order precluding the plaintiff in the within action, William Gasperini, from presenting any evidence during the trial of this action with regard to the existence and/or applicability of a claimed "industry standard" pursuant to which a uniform predetermined minimum amount of compensation is assigned to each and every slide transparency which may have been lost or damaged. This Order is requested in light of the prevailing decisional law establishing that no such "industry standard" exists and that to permit the jury

in this action to hear comment or testimony as to its existence would be prejudicial to the defendant herein.

Dated: New York, New York.
June 23, 1994.

BIGHAM ENGLAR JONES &
HOUSTON
Attorneys for Defendant
The Center for Humanities d/b/a
Guidance Associates

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Attorney for Plaintiff
251 West 91st Street
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Motion Denied. See transcript of trial for oral decision.

SO ORDERED

June 27, 1994

U.S. DISTRICT COURT
S.D. OF N.Y.
FILED JUN 27, 1994

/s/ Charles Brieant
U.S.D.J.

ENTERED: June 27, 1994